Nos. 06-340, 06-549

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,
Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,
Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

DEFENDERS OF WILDLIFE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* HIGH PRODUCTION HOMEBUILDERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici will address the following question:

Whether, assuming that § 7 of the Endangered Species Act applies to non-discretionary agency action, this provision is nonetheless bounded by requirements of proximate causation that prevent interference with the delegation to Arizona of permitting authority under § 402 of the Clean Water Act.

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INTERESTS OF *AMICI CURIAE*[1]

Amici Beazer Homes USA, Inc., Centex Corporation, David Weekley Homes, Hovnanian Enterprises, Inc., KB Home, Kimball Hill, Inc., Lennar Corp., M.D.C. Holdings, Inc., Meritage Homes Corporation, M/I Homes, Inc., Pulte Homes, Shea Homes, Standard Pacific Corp., Toll Brothers, Inc., and Weyerhaeuser Real Estate Co. (collectively, "High Production Homebuilders") are 15 of the largest residential homebuilders in the Nation. *Amici* engage in residential construction on all scales, from the design of individual homes to the development of large residential communities. In 2005 alone, *amici* sold more than 262,000 homes, generating over $90.9 billion in revenue and representing over 20% of the United States new home market. In providing these homes to the Nation's population, *amici* not only satisfy a fundamental human need, they also promote a critical national priority, as Congress has reaffirmed over and over again.[2]

Before they begin homebuilding projects, *amici* typically must obtain permits under a variety of federal, state and local regimes. These include the type of Clean Water Act (CWA) permits at issue in this case, which allow point-source discharges to the waters of the United States. See CWA § 402, 33 U.S.C. § 1342. And they include other federal permits,

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

[2] *See* 42 U.S.C. § 1441 ("The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development ...."); *id.* § 12701 (affirming "the national goal that every American family be able to afford a decent home in a suitable environment"); *see also, e.g.*, National Housing Act of 1934, ch. 847, 48 Stat. 1246 (codified as amended at 12 U.S.C. § 1701 *et seq.*); Housing Act of 1961, Pub. L. No. 87-70, 75 Stat. 149; Department of Housing and Urban Development Act of 1965, Pub. L. No. 89-174, 79 Stat. 667.

such as permits for the discharge of fill material under § 404 of the CWA. *Id.* § 1344.[3] Before such federal permits may be issued, § 7 of the Endangered Species Act (ESA) generally requires the federal agencies permitting the undertaking – here, the Environmental Protection Agency (EPA) – to engage in "consultation" with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) and to ensure that their actions will not cause jeopardy to species.

The nature and scope of these inter-agency consultations and actions are profoundly important to *amici*, because they are immensely burdensome and time-consuming. The permitting process for a residential development can take years and cost hundreds of thousands of dollars – figures often compounded by interest-group litigation when the permit finally issues. And agency-ordered "alternative measures" may cost millions. Accordingly, *amici* have a substantial interest in ensuring that the consultation requirement remains within the boundaries established by Congress and the agencies' own regulations. The decision below fails to follow the proper scope of these authorities.

Like Petitioners EPA and NAHB, *amici* urge this Court to hold that, as a matter of law, the transfer of NPDES permitting authority from EPA to Arizona was nondiscretionary and therefore did not require ESA consultation at all. The focus of this Brief, however, is the question that this Court must address if it concludes that consultation was not categorically excluded: namely, the requisite causal relationship between an agency action and claimed jeopardy to species. This cau-

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[3] EPA has delegated the § 402 discharge permitting program to 45 of the 50 States (including Arizona). *See* USEPA, *National Pollutant Discharge Elimination System (NPDES): State Program Status*, *at* http://cfpub.epa.gov/npdes/statestats.cfm (last updated Apr. 14, 2003). However, the § 404 dredge and fill permitting program has been delegated to only two States, New Jersey and Michigan. *See* USEPA, *State or Tribal Assumption of the Section 404 Permit Program*, *at* http://www.epa.gov/owow/wetlands/facts/fact23.html (last updated Feb. 22, 2006).

sation requirement both triggers the consultation requirement and defines its scope. Under the text of the ESA, its implementing regulations, this Court's longstanding causation jurisprudence – and indeed any common-sense understanding of causation – the agency action must be a *proximate* cause of the claimed "jeopardy." That is, the agency must evaluate whether an action will result in harm to species that is *direct* and *foreseeable*, not remote, attenuated, or speculative.

The alternative the Ninth Circuit adopted – bare "but-for" causation – would force agencies to engage in far-reaching analyses of hypothetical effects. Moreover, it would foreclose any agency action that could imaginably result in harm, no matter how remote that possibility or how attenuated the chain of causation. This cannot be what Congress intended, which is why nothing in the statute, its regulations or its legislative history supports such an extreme result. Yet this is precisely what the Ninth Circuit held: The court below concluded that the simple act of transferring permitting authority from EPA to the State of Arizona would cause jeopardy to species, notwithstanding the substantial causal remoteness between this "action" and any surmised harm. This decision would amount to an extraordinary expansion of the ESA, which this Court should reject.

STATUTORY AND REGULATORY BACKGROUND

I. The § 7 consultation process arises out of the requirement that federal agencies "insure that any action [they] authorize[], fund[], or carr[y] out" is "not likely" to jeopardize any endangered or threatened species or to adversely modify critical habitat. 16 U.S.C. § 1536(a)(2); see generally *Bennett* v. *Spear*, 520 U.S. 154, 157-58 (1997). Consultation is an interagency dialogue between (1) the "action agency" that intends to authorize, fund, or carry out an action, and (2) the agencies with authority related to species (FWS and NMFS; collectively, the "Services"), and involving interested private parties, such as an applicant for a federal permit.

To determine whether consultation is required, the "action agency" first identifies whether a protected species or habitat exists within the proposed action area and whether the proposed action "may affect" the species or habitat. 50 C.F.R. § 402.14(a). If so, the "action agency" must engage in formal consultation with the Service, subject to two important exceptions. *Id.*; see Interagency Cooperation – Endangered Species Act of 1973, as amended, 51 Fed. Reg. 19,926, 19,941 (June 3, 1986) ("A Federal agency must initiate formal consultation if it determines that its action 'may affect' any listed species or its critical habitat unless it determines through informal consultation or biological assessment procedures, with the written concurrence of the Service, that its action 'is not likely to adversely affect' such species or habitat.").

Formal consultation requires the Service to prepare a "biological opinion" (BiOp) evaluating whether the action is "likely to jeopardize" a protected species. 50 C.F.R. § 402.14(h). During this evaluation – which often requires multiple rounds of discussions between the agencies – the "action agency" must provide substantial information to the Service. *Id.* § 402.14(c)-(g). If the Service ultimately reaches a "no jeopardy" conclusion, the action can go forward. *Id.* § 402.14(h). If, however, the Service concludes that the action is likely to jeopardize a protected species, it will recommend project modifications. *Id.* If no such alternatives exist, the agency must cancel the action, seek an exemption, or risk violating the ESA. A developer that proceeds without the blessing of the consultation process is in turn potentially subject to suit under § 9 of the ESA, with the attendant threat of civil and criminal penalties. See 16 U.S.C. §§ 1538, 1540(a), (b), (g).

II. The consultation process is fraught with problems, including delay and expense. See GAO, Pub. No. GAO-04-93, *Endangered Species: More Federal Management Attention Is Needed to Improve the Consultation Process* (2004) ("GAO Report"). After examining several years' worth of consulta-

tion records, the GAO concluded that 30-40% of the Services' consultations exceeded the time frames established by statute or regulation. *Id.* at 3. Indeed, these statistics understate the delay, because they exclude the "sometimes significant amount of preconsultation time spent discussing a project before the consultation is considered to have officially begun" – a period during which the action cannot proceed. *Id.*; see also *id.* at 17 (noting that preconsultation time "may account for *the majority* of the time spent on the entire consultation process" (emphasis added)).

For a private party, the costs and delays of becoming entangled in consultation can be significant. For example, the listing of the bull trout caused the average processing time for permits to build private docks or structures on Lake Washington (near Seattle) to increase from 2-3 months to two *years*. *Id.* at 55-56. The pygmy owl listing caused delays of 5-18 months. See http://www.nahb.org/news_details.aspx?newsID=2379&sectionID=194 ("NAHB Release").

These burdens are compounded because the Services often push the bounds of their statutory and regulatory authority to and beyond their limits. According to the GAO, "action agency" officials reported "that the process had gotten out of control, that they were consulting on many more activities than was necessary, and that consultations were going beyond what was called for by the Endangered Species Act." GAO Report at 43. For example, "the Services sometimes recommend consultation when it is not really necessary and ... they request similarly unnecessary amounts of scientific analysis and documentation on potential effects." *Id.* at 39.

Agency delay and overreach beget private costs. These costs involve the actual expenses incurred during the consultation process; increased costs of unwarranted or unauthorized project modifications and mitigation; and of course opportunity costs. Applicants frequently must hire private consultants to assist in the preparation of biological assessments and mitigation plans and to negotiate with the agencies, often

at substantial cost. *Id.* at 55. In the case of the bull trout, permitting costs – which had been 5% of the total construction costs for a typical dock – rose to 33% of that total cost. *Id.* at 54. The consultation and project modifications ensuing from the pygmy owl listing added $1.7 - $2.7 million to the cost of a typical Arizona development. See NAHB Release. Similar stories abound, with compliance, consultation and mitigation giving rise to massive costs that an overly broad causation standard will only compound.[4]

SUMMARY OF THE ARGUMENT

The decision below depended in part on the erroneous conclusion that the ESA prohibits any agency action that could, under a but-for causation standard, result in "jeopardy" to protected species, no matter how tangential or remote the link might be. *Defenders of Wildlife* v. *EPA*, 420 F.3d 946, 962 (9th Cir. 2005). This interpretation finds no support in law or logic. Throughout the law, *proximate* causation is the dominant standard, and absent strong congressional intent to the contrary, serves as the default rule. Proximate cause is the core causation standard under the common law, as this Court has repeatedly recognized. It is the presumptive standard in federal statutes – even those with broad language of causa-

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[4] *See, e.g.*, Gillian Flaccus, *City May Shoo Endangered Fly*, Chi. Trib., Feb. 11, 2007 ("[Colton, California officials] say restrictions on building on the [Delhi Sands flower-loving fly] habitat have limited commercial growth and cost tens of millions of dollars in economic development."); Felicity Barringer, *Endangered Species Act Faces Broad New Challenges*, N.Y. Times, June 26, 2005 (citing Agua Caliente Band of Cahuilla Indians' claim that more than half the tribe's 31,000 acres fall into designated habitat, resulting in "'an economic impact of hundreds of millions of dollars'"); Mitch Tobin, *'Endangered' Cactus May Really Be Prolific*, Ariz. Daily Star, May 9, 2004 ("The [Pima pineapple] cactus may force one prominent builder to raise the price of 72 homes by $1,181 each. In the mid-1990s, the cactus threatened to add $10 million to the cost of a proposed 650-acre reservoir on the Southwest Side for the Central Arizona Project. The proposal was later shelved.").

tion. Environmental statutes such as the ESA are no exception. In *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, for instance, all nine Justices treated proximate cause as the "ordinary requirement[]" and applied it to § 9 of the ESA. 515 U.S. 687, 696 n.9 (1995).

Nothing in § 7 of the ESA or its implementing regulations suggests that Congress intended to impose any standard other than the "ordinary" rule of proximate cause. To the contrary, the text and implementing regulations affirmatively show that § 7 incorporates the usual rule of proximate causation. Over and again, § 7 and its regulations employ terminology well-understood as denoting proximate cause. Moreover, the legislative history of the Act reveals a clear desire to avoid the costs and bureaucratic complications arising out of a regime predicated on but-for causation.

Here, the transfer of permitting authority from EPA to Arizona is far too remote from the hypothesized harm to satisfy proximate cause. The transfer itself does not authorize any harm to species at all – it authorizes no permit to issue and no development to occur, much less any activity that is intrinsically harmful. Instead, the transfer simply means that the Arizona agency may issue permits sometime in the future. Moreover, those permits do not themselves primarily induce development; individual development decisions are based on numerous independent, intervening factors, including the financial market, supply, demand, and political choice. And if development does occur, any harm to species remains speculative, especially because substantial other protections for species exist. Finally, the causal chain between the water discharge permits and the hypothesized harms to species – which are entirely "non-water quality related impacts," NAHB Pet. App. 562 (Elevation Document) – is far too attenuated to warrant application of the ESA.

ARGUMENT

I. THROUGHOUT THE LAW, PROXIMATE CAUSE – NOT MERE BUT-FOR CAUSE – IS THE DEFAULT RULE OF CAUSATION.

The view of causation adopted by the Ninth Circuit is without meaningful limit and would have absurd practical effects. It is, moreover, antithetical to the common-law understanding of proximate causation, as well as this Court's clear application of that principle to federal statutes in all areas of law. Particularly in the context at issue here, where the law requires agencies to predict, analyze, and mitigate the future effects of their proposed actions, it is essential to apply a proximate-cause standard that imposes sensible limits on agency inquiry and legal responsibility.

A. To Prevent Limitless Liability, Proximate Cause Is The Rule At Common Law.

It is a fundamental precept of statutory construction that Congress enacts statutes against the backdrop of the common law. Congress is presumed to know the standards that exist at common law and, absent a clear indication to the contrary, to incorporate them in the statutes it enacts. See, *e.g.*, *United States* v. *Wells*, 519 U.S. 482, 491 (1997). Nothing remotely suggests that Congress abrogated common-law principles when it enacted the ESA. See *Sweet Home*, 515 U.S. at 697 n.9, 700 n.13; see also *infra* Part II. Accordingly, to understand the causal relationship between an agency "action" and potential "jeopard[y]" to species that is necessary to trigger the ESA's statutory consultation requirement, 16 U.S.C. § 1536(a)(2), we begin with the common law.

For more than a century, the common-law rule of causation has been proximate cause. See, *e.g.*, 1 Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* § 26, at 27 (5th ed. 1898) ("The breach of duty, upon which an action is brought, must be not only the cause, but the *proximate cause*, of the damage to the plaintiff."); Charles

Fisk Beach, Jr., *A Treatise on the Law of Contributory Negligence or Negligence as a Defense* § 305, at 446 (3d ed. 1899) (proximate cause is "too firmly founded on reason and justice to be lost sight of in any discussion of liability for negligence"); William B. Hale, *Handbook on the Law of Torts* § 227, at 449 (1896). This Court has long recognized proximate cause as the common-law rule. See, *e.g.*, *Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918) (using proximate cause under Federal Employers Liability Act, which incorporates common law standards); see also *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 531-33 (1983) (discussing the settled proximate cause standard at the end of the 19th century). And proximate cause continues to be the common-law rule today. See Restatement (Second) of Torts §§ 281(c), 430-462 (1965); Restatement (Third) of Torts: Apportionment of Liability § 3 (2000).

Proximate cause has been adopted so widely because the alternative – "but-for" causation – is no meaningful alternative at all. But-for cause merely asks whether the alleged harm would have occurred in the absence of (*i.e.*, "but for") the complained-of action. This rule leads to "extreme results," because "'the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond.'" *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 838 (1996); see also W. Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 266 (5th ed. 1984) ("*Prosser & Keeton*") ("The event without millions of causes is simply inconceivable ...."); Restatement (Second) of Torts § 431 cmt. a. Given this truism, a statute dictating conduct or resting liability on mere but-for causation would be potentially limitless:

> "The chief and sufficient reason for [proximate cause] is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of

> events at the point beyond which experience and observation convince us we cannot press our inquiries with safety."

Associated Gen. Contractors of Cal., 459 U.S. at 532 n.24 (quoting T. Cooley, *A Treatise on the Law of Torts* 73 (2d ed. 1888)); *accord* 1 J.G. Sutherland, *A Treatise on the Law of Damages* 57 (1883).

Simply put, proximate cause is necessary "to hold the defendant's liability within some reasonable" – and objectively justifiable – "bounds." *Prosser & Keeton* § 44, at 302. And it serves to prevent liability from being imposed for "remote consequences." *Sweet Home*, 515 U.S. at 713 (O'Connor, J., concurring); *accord Southern Pac. Co.*, 245 U.S. at 533-34 ("The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss."). Proximate causation thus acts as a "tool[] to limit a person's responsibility for the consequences of that person's own acts." *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). This tool reflects both "'ideas of what justice demands'" and "'of what is administratively possible and convenient,'" *id.* (quoting *Prosser & Keeton* § 41, at 264), as well as an effort to draw a line as to the "appropriate scope of responsibility," Dan D. Dobbs, *The Law of Torts* § 180, at 443 (2001). The inquiry thus works toward answering a single question: whether the complained-of action is "so closely connected with the result and of such significance that the law is justified in imposing liability." *Prosser & Keeton* § 41, at 264.

B. Proximate Cause Is The Default Rule For Federal Statutes.

1. Given the ubiquity of proximate causation at common law – and the practical necessity of the rule for preventing limitless liability – it is unsurprising that proximate cause is the default rule for federal statutory law. The rule of proxi-

mate cause has such force that this Court frequently has interpreted statutes that specify no particular causation standard as incorporating the usual rule of proximate cause. See *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1995-98 (2006); *Dura Pharms.* v. *Broudo*, 544 U.S. 336, 342-48 (2005); *Sofec*, 517 U.S. at 836-39 (1996); *Holmes*, 503 U.S. at 268; *Associated Gen. Contractors of Cal.*, 459 U.S. at 529-337; *Southern Pac. Co.*, 245 U.S. at 533-34.

In *Associated General Contractors*, for instance, this Court interpreted an exceptionally broad statutory provision as incorporating customary principles of proximate causation. The Clayton Act's private damages provision authorizes a cause of action for "[a]ny person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws." 15 U.S.C. § 15 (emphasis added). Although the Court observed that a "literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of" a forbidden act, it declined to impose such but-for liability, because that would "encompass every conceivable harm that can be traced to alleged wrongdoing." 459 U.S. at 529, 536; see also *id.* at 534 ("'Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that *might conceivably be traced* to an antitrust violation.'" (emphasis added)). In short, to ensure that the inquiry of the courts remains squarely within manageable limits, doctrines such as foreseeability and proximate causation are applied.

This Court likewise has interpreted broadly worded racketeering and securities law provisions as requiring proximate cause. In *Holmes* v. *SIPC*, the Court evaluated the causation requirement of the Racketeering-Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* Like the Clayton Act, RICO requires only an injury "by reason of" a statutory violation. *Id.* § 1964(c). Noting that "[t]his language can, of course, be read to mean" that "the defendant's violation was a 'but for' cause of the plaintiff's injury," the

Court found it implausible that Congress intended to impose liability on such a thin basis. 503 U.S. at 265-66. The Court relied on the rationale that has supported the doctrine of proximate cause for more than a century:

> "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.'"

Id. at 266 n.10. Practical considerations, too, militated against but-for causation: "[T]he less direct an injury is, the more difficult it becomes" to determine whether the injury is attributable to the complained-of conduct "as distinct from other, independent, factors." *Id.* at 269; *accord Anza*, 126 S. Ct. at 1998 ("The element of proximate causation ... is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation.").

Dura presented a similar issue under the securities laws. Again, the statute did not specify the necessary causal connection; it simply required proof "that the defendant's misrepresentations 'caused the loss for which the plaintiff seeks to recover.'" 544 U.S. at 345-46. And again, this Court looked to "the common-law roots" of the cause of action, and held that the plaintiff "need[s] to prove proximate causation." *Id.* at 344.

2. These longstanding principles – which have applied to limit liability in *retrospective* damages inquires – are even more important where (as here) they involve a *prospective* inquiry. In the context of backward-looking liability, an injury already has occurred, and the case for relief is manifest. Yet even there, the law deems many actions to be too remote and tenuous to be the legal cause of an actual harm, and so embraces proximate cause.

Cases involving *prospective* inquiries, which involve huge administrative costs and carry the risk of substantial financial consequences, create even greater opportunity for endless hypothetical conjecture. As a result, without a meaningful proximate cause standard, suits for prospective relief would be limited only by the imagination of the plaintiff or, as here, the agency's speculation about what future effects might occur. Thus, there is no reason to treat causation differently in statutes requiring affirmative conduct – if anything, the justification for a meaningful proximate cause standard is stronger.

This Court recognized this concern in defining the effects that agencies must examine under the National Environmental Policy Act (NEPA). NEPA requires agencies engaging in "major Federal actions significantly affecting the quality of the human environment" to complete "a detailed statement ... on (i) the environmental impact of the proposed action, [and] (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(C). In *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 774 (1983), and again in *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004), the Court held that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect," 541 U.S. at 767, and thus is insufficient to require the agency to analyze that effect under NEPA.

In *Metropolitan Edison*, the Court reasoned that NEPA requires "a reasonably close causal relationship between a change in the physical environment and the [prospective] effect at issue," which it interpreted as being "like the familiar doctrine of proximate cause from tort law." 460 U.S. at 776 (citing W. Prosser, *Law of Torts* ch. 7 (4th ed. 1971)). This was necessary to limit the drain on "time and resources" that would result if an agency were forced to examine hypothetical, attenuated effects:

> [A]gencies would, at the very least, be obliged to expend considerable resources .... The available resources may be spread so thin that agencies are unable adequately to pursue protection of the physical environment and natural resources.... [W]e cannot attribute to Congress the intention to ... open the door to such obvious incongruities and undesirable possibilities.

Id. (internal citation and quotation marks omitted). In this context, a rule of but-for causation would require the evaluation of an endless regression of causes and hypothesized, eventual effects. Proximate cause, accordingly, serves the necessary goal of conserving scarce agency resources:

> Time and resources are simply too limited for us to believe that Congress intended to extend NEPA as far as the Court of Appeals has taken it. The scope of the agency's inquiries must remain manageable if NEPA's goal of 'ensur[ing] a fully informed and well considered decision' is to be accomplished.

Id. at 776 (quoting *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 551 (1978)). In short, the use of a but-for standard would sweep in so many possible effects, and the agencies' required analysis would as a result be so burdensome, that the core statutory goal would be undermined.

These considerations apply with even greater force here. Section 7 of the ESA, like NEPA, entails a prospective analysis of the "effects" that may flow from an agency action. But whereas NEPA simply requires "a detailed statement" of those effects, 42 U.S.C. § 4332(C), the ESA requires the agency to "insure" that such adverse effects do not occur. 16 U.S.C. § 1536(a)(2); see also *TVA* v. *Hill*, 437 U.S. 153, 173 (1978). Accordingly, FWS has recognized that "NEPA ... warrant[s] a *more* expanded review" than does the ESA. Interagency Cooperation, 51 Fed. Reg. at 19,933 (emphasis

added). The Ninth Circuit's contrary rule[5] would lead to wide-ranging inquiries into remote and hypothetical harms.

II. SECTION 7 OF THE ESA AND ITS IMPLEMENTING REGULATIONS INCORPORATE BASIC PRINCIPLES OF PROXIMATE CAUSE AND FORESEEABILITY.

A. This Court Has Interpreted ESA § 9 As Requiring Proximate Cause.

As *Metropolitan Edison* and *Public Citizen* demonstrate, environmental law is no exception to the presumptive rule of proximate cause. Those cases applied proximate cause to NEPA, and proximate cause is the rule in other environmental statutes as well. See, *e.g.*, *United States* v. *West of Eng. Ship Owner's Mut. Prot. & Indem. Ass'n (Lux.)*, 872 F.2d 1192, 1198-1200 (5th Cir. 1989) (Federal Water Pollution Control Act); *Benefield* v. *Exxon Corp.*, 959 F.2d 805, 807 (9th Cir. 1992) (Trans-Alaska Pipeline Authorization Act).[6] Indeed, this Court already has applied fundamental principles of proximate causation to the ESA. See *Sweet Home*, 515 U.S. 687.

Sweet Home involved § 9 of the ESA, 16 U.S.C. § 1538, which forbids the "knowing" "take" of an endangered or threatened species. Although this provision does not expressly use the terms "cause" or "proximate cause," the Court

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[5] *Cf. Defenders of Wildlife*, 450 F.3d at 404-05 (Berzon, J., concurring in denial of rehearing en banc) (wrongly concluding that the ESA requires a broader inquiry than NEPA).

[6] The presumption that statutes incorporate common-law principles of proximate cause is especially appropriate in the environmental arena, because environmental law was born of the common-law tort of nuisance. *See* Robert V. Percival et al., *Environmental Regulation: Law, Science, and Policy* 60-61 (4th ed. 2003). Nuisance doctrines long have contained a proximate cause requirement. *See, e.g.*, Restatement (Second) of Torts § 822 (private nuisance); *County of Westchester* v. *Town of Greenwich*, 76 F.3d 42, 45 (2d Cir. 1996) (public nuisance).

easily found it to incorporate "ordinary requirements of proximate causation and foreseeability." 515 U.S. at 697 n.9 (interpreting the phrases "knowingly violates" and "otherwise violates" to incorporate proximate causation and foreseeability); see also *id.* at 701 n.13 (same).

The concurring and dissenting Justices all agreed that the ESA incorporates foreseeability and proximate cause. See *id.* at 712 (O'Connor, J., concurring) ("I see no indication that Congress ... intended to dispense with ordinary principles of proximate causation."); *id.* ("In the absence of congressional abrogation of traditional principles of causation, then, private parties should be held liable ... only if their ... actions proximately cause [the prohibited results]."); *id.* at 732 (Scalia, J., dissenting) ("I quite agree that the statute contains" a proximate cause requirement, "because the verbs of purpose in [§ 9] denote action directed at animals."). In short, "[i]n the absence of congressional abrogation of traditional principles of causation, then, private parties should be held liable [under § 9] only if their ... actions proximately cause death or injury to protected animals." *Id.* at 712 (O'Connor, J., concurring).

As the concurring opinion further explained, proximate cause serves a critical function in limiting legal responsibility within sensible and just boundaries. And that fundamental purpose applies with full force to the ESA. Because "proximate causation 'normally eliminates the bizarre,'" the application of proximate cause prevents the creation of duties and the imposition of liability for "remote consequences" that this Court has recognized to be beyond the ESA's reach. *Id.* at 713 (O'Connor, J., concurring) (citations omitted).

B. Section 7 Of The ESA Likewise Requires Proximate Cause.

1. The same bedrock principles of causation that *Sweet Home* found in § 9 of the ESA apply to § 7 of that statute as well. As in *Sweet Home*, nothing in the statute or regulation indicates that the "ordinary" rule of proximate causation

should not apply to § 7. To the contrary, the text of § 7 demonstrates that Congress affirmatively incorporated proximate causation into the statute, just as it did in § 9.

There can be little doubt that the language of § 7 contains a causation requirement. Section 7(a)(2) requires federal agencies to

> insure that any action authorized, funded, or carried out by such agency ... is *not likely to jeopardize* the continued existence of any endangered species or threatened species or *result in* the destruction or adverse modification of habitat of such species.

16 U.S.C. § 1536(a)(2). Just as the term "harm" is defined as "to *cause* hurt or damage to," *Sweet Home*, 515 U.S. at 697 (emphasis added), the verb "jeopardize" at issue here means "*to cause* (something) to be harmed or damaged." *Cambridge Dictionary of American English* 469 (2000) (emphasis added); see also *Sweet Home*, 515 U.S. at 732 (Scalia, J., dissenting) (recognizing that "the verbs of purpose in [§ 9] denote action directed at animals," and therefore implicate proximate cause). What is more, the statutory phrase "result in" is a synonym for "cause." A "cause" leads to a "result," and an action that "results in" an effect is the cause of that effect. See *Roget's II: The New Thesaurus* 831 (1988) ("result in" is a synonym for "[t]o be the cause of"); see also *National Wildlife Fed'n* v. *Hodel*, 839 F.2d 694, 745 (5th Cir. 1988) ("[t]he phrase 'resulting from or incident to' clearly suggests a causal connection, which ... certainly does require some type of limiting principle of proximate causation").

Thus, nothing in the statute indicates that § 7 departs from the "ordinary" rule of proximate cause – the basic text is to the contrary. Indeed, additional statutory terms confirm the existence of such a requirement. Under § 7, the "action agency" must ensure that its conduct is "not likely to" cause jeopardy or result in the destruction of habitat. 16 U.S.C. § 1536(a)(2). This language of "likelihood" is commonly

used to denote proximate cause. See, *e.g.*, *Brower* v. *County of Inyo*, 489 U.S. 593, 599 (1989) (linking proximate causality to whether a result was "likely"); *Waters-Pierce Oil Co.* v. *Deselms*, 212 U.S. 159, 179 (1909) (tying proximate cause to the "likely ... result").

2. The legislative history of § 7 further demonstrates that Congress drafted the statute to ensure that agencies would not be forced to evaluate and mitigate remote and speculative harms. The statute originally commanded agencies to make certain that their actions "*do[] not* jeopardize species.[7] The statute was amended in 1979 to reflect the current text, which requires agencies to "insure" that their actions are "not *likely to*" jeopardize species. 16 U.S.C. § 1536(a)(2). The Conference Committee explained that Congress made this change because

> [a]s currently written ... the law could be interpreted to force the [consulting agency] to issue negative biological opinions whenever the action agency cannot guarantee with certainty that the agency action will not jeopardize the continued existence of the listed species or adversely modify its critical habitat.

H.R. Conf. Rep. No. 96-697, at 12 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2572, 2576. This statement plainly reveals Congress's intent that agencies review only the direct and foreseeable impacts of their actions on species, and not engage in purely hypothetical analyses of remote and speculative chains of causation.

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[7] The pre-1979 version of statute read:

> All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [this Act] by taking such actions necessary to insure that actions authorized, funded, or carried out by them *do not jeopardize* the continued existence of such endangered species and threatened species or result in the destruction or modification of [critical] habitat of such species ....

16 U.S.C. § 1536 (1976) (emphasis added).

3. The implementing regulations are consistent with the statute – as they must be – and incorporate the same customary standards of proximate causation and foreseeability. At the threshold, they require each "action agency" to "review its actions ... to determine whether any action may affect" listed species or critical habitat. 50 C.F.R. § 402.14(a). If so, some form of consultation is required. See *supra* at 3-4 (discussing the consultation process). And, at each step along the way, the regulations governing the consultation process sound in (and perform the function of) proximate cause – *viz.*, "to hold the [inquiry] within some reasonable bounds." *Prosser & Keeton* § 44, at 302.

Thus, during consultation, the relevant Service must determine whether the action "is *likely to jeopardize*, 50 C.F.R. § 402.14(g)(4), or "*likely to adversely affect*," *id.* § 402.13(a), species or habitat (emphases added). As noted above, the language of action and "likelihood" commonly are used to embrace proximate cause. In addition, the phrase "jeopardize the continued existence of" is defined as "engag[ing] in an action that *reasonably would be expected*, directly or indirectly, to *reduce appreciably the likelihood* of both the survival and recovery of a listed species." *Id.* § 402.02 (emphasis added). Again, this language of reasonable expectation and reasonable likelihood invokes fundamental precepts of proximate cause. See, *e.g.*, *Metropolitan Edison Co.*, 460 U.S. at 774 (interpreting the statutory term "reasonably close causal relationship" as invoking proximate cause"); *Prosser & Keeton* § 41, at 263 (proximate cause requires a "reasonable connection" between the act and the damage); *id.* § 43, at 300 (invoking a "reasonably close connection").[8]

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[8] Similar standards govern the informal consultation process. *See* 50 C.F.R. § 402.13. Specifically, "the consultation process is terminated" if "the action is not *likely to adversely affect* listed species or critical habitat." *Id.* § 402.13(a) (emphasis added).

Moreover, in conducting their analyses, the Services are obliged to examine the "effects of the action" proposed, as well as "cumulative effects." 50 C.F.R. §§ 402.12(a), 402.14(g)(3). The "effects of the action" are defined as "direct" effects and "indirect" effects. *Id.* § 402.02.[9] The phrase "direct effects" obviously denotes proximate cause. See *Prosser & Keeton* § 43, at 294 n.13 ("direct" is "a general synonym for 'proximate'"); *Sweet Home*, 515 U.S. at 732 (Scalia, J., dissenting) ("'[P]roximate' causation simply *means* direct causation."). In addition, the regulations specifically define the terms "indirect" and "cumulative" effects to embody notions of proximate causation. See 50 C.F.R. § 402.02 (defining "indirect effects" as "those that *are caused by* the proposed action and are later in time, *but still are reasonably certain to occur*" (emphasis added)); *id.* (defining "cumulative effects" as "those effects of future State or private activities ... that are *reasonably certain to occur*"); Interagency Cooperation, 51 Fed. Reg. at 19,933 (excluding "speculative actions" from "the 'cumulative effects' analysis"). Indeed, this Court held in *Sweet Home* that "indirect" effects, 515 U.S. at 697-98, incorporate principles of proximate cause, *id.* at 696 n.9, 700 n.13.[10]

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[9] The "effects of the action" also include "effects of other activities that are interrelated or interdependent with that action." 50 C.F.R. § 402.02. Contrary to the court's *sua sponte* analysis below, 420 F.3d at 972-73, "interrelated" and "interdependent" actions are not at issue here, because any future development is not "part of a larger action" (the transfer of authority to Arizona); does not "depend on the larger action for [its] justification"; and does not lack "independent utility apart from the action under consideration." 50 C.F.R. § 402.02. Tellingly, in quoting the regulation the opinion below omitted much of this critical limiting language.

[10] In one sentence, the BiOp states that FWS "uses the 'but for' test." NAHB Pet. App. 112. But this statement, unsupported by any citation, is contrary to the statute and regulations. Even if it were not, FWS cannot be referring to "but for" causation as typically understood, given that the same paragraph of the BiOp equates but-for causation with the "substantial factor" test which is an alternative standard altogether. *Id.*; *see Prosser & Keeton* § 41, at 265-68.

III. THE DECISION BELOW IMPROPERLY ABANDONED TRADITIONAL CONCEPTS OF PROXIMATE CAUSATION AND EMPLOYED AN EXTREME VERSION OF BUT-FOR CAUSATION.

The Ninth Circuit's decision abandoned the bedrock principle of proximate cause. Rejecting the argument that "it is private development, not the EPA's transfer decision, that would cause any impact on listed species," the panel adopted a "but for" causation standard, observing that "[e]vents can be caused by several actions *in a 'but-for' causal chain.*" *Defenders of Wildlife*, 420 F.3d at 962 (emphasis added). The court offered no real explanation for this departure from basic causation principles, but instead stated simply that:

> Obviously, without private decisions to construct new developments, there will be no Clean Water Act construction permits and no impact from the issuance of such permits on listed species or their habitats. Just as obviously, without the transfer of permitting authority from the federal to the state government, developers could be required, as they were before the transfer decision, to mitigate any impact from their development decision.... The Biological Opinion's determination to the contrary disregards the obvious cause analysis ....

Id. at 961-62.

The panel below did not purport to hold that the transfer of permitting authority was a *proximate* cause of jeopardy to species – and properly so. The chain of events that purportedly links the transfer of permitting authority to the hypothesized jeopardy entails precisely the type of "remote consequences," *Southern Pac. Co.*, 245 U.S. at 533-34, and "ripples of harm," *Associated Gen. Contractors of Cal.*, 459 U.S. at 534, that are the antithesis of proximate cause.

Specifically, before jeopardy to species could occur here, the following lengthy chain of intervening events would have to occur:

1) EPA transfers NPDES permitting authority to the State of Arizona;

2) Arizona establishes conditions for issuing CWA permits that provide no meaningful substitute for federal ESA consultation;

3) A developer proposes to construct a development;

4) The developer determines whether the development requires an NPDES permit and, if so, applies for it;

5) Arizona determines whether to grant the NPDES permit to the developer, and grants it;

6) The developer acquires any federal permits required to construct the development – for example, a dredge-and-fill permit under CWA § 404, which is not delegated to the State and which may itself trigger ESA consultation;

7) The developer acquires all of the other state, local, and financial approvals required to construct the development;

8) The developer constructs the development and – ignoring the ESA § 9 prohibition against taking species – harms a species of concern.

This causal chain is far too remote and attenuated to satisfy any notion of proximate cause. See *Metropolitan Edison*, 460 U.S. at 774 ("Some effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation, will nonetheless not fall within [NEPA] § 102 because the causal chain is too attenuated."); Restatement (Second) of Torts § 433(a) (causation is determined, in part, with reference to "the number of other factors which contribute in producing the harm"). Simply put, "Congress did not intend that

Federal actions be precluded by such speculative actions." Interagency Cooperation, 51 Fed. Reg. at 19,933.[11]

First, the "agency action" itself will not proximately cause any harm to species. Far from it: All that is at issue here is "an administrative transfer of authority" that "will not cause development." NAHB Pet. App. 113 (BiOp); *id.* at 114-17 (observing that jeopardy or habitat alteration is not a natural or inevitable byproduct of the transfer of authority).[12] The transfer does not "authorize" a single development; it does nothing more than change the conditions under which development might occur. *Id.* at 80.

That is not enough to establish causation. Causation turns on whether the defendant's conduct has "created a force or series of forces which are in continuous and active operation up to the time of the harm," and it is not enough simply to "create[] a situation harmless unless acted upon by other forces for which the actor is not responsible." Restatement (Second) of Torts § 433(b). Here, this basic requirement is not met. The transfer of permitting authority from EPA to the State of Arizona does not set in motion "forces [that] are in continuous and active operation up to the time of" jeopardy to species. It simply establishes a condition under which, if a

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[11] Indeed, this causal chain is so attenuated that it raises serious questions about Respondents' standing. *See Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (standing requires a showing of causation). As the D.C. Circuit recognized in the NEPA context, "[s]uch a protracted chain of causation fails [to provide standing] both because of the uncertainty of several individual links and because of the number of speculative links that must hold for the chain to connect the challenged acts to the asserted particularized injury." *Florida Audubon Soc'y* v. *Bentsen*, 94 F.3d 658, 670 (D.C. Cir. 1996) (en banc).

[12] *See also* Biological Evaluation for Endangered Species Act Consultation on USEPA's Proposed Approval of the State of Arizona's NPDES Program (June 21, 2002) ("Biological Evaluation") (NAHB Pet. App. 615, 617) (proposed action is "an administrative shift of authority and is not associated with any physical action that will alter habitat or affect biota").

variety of other circumstances come to pass, effects on species someday may result.

Second, a variety of complicating and intervening factors further attenuate causation. At bottom, the Ninth Circuit's concern was that a permit issued by Arizona under the transferred authority might allow private development. However, "[d]evelopments are driven by any number of factors, including but not limited to demand, supply, economics, political decisions, zoning regulations, and financial market stability." NAHB Pet App. 113 (BiOp). This Court has rejected causal chains far less tenuous than this one. In *Holmes*, for instance, the Court rejected a RICO claim as too "remote," reasoning that "the less direct an injury is, the more difficult it becomes to ascertain the [injury] attributable to the violation, as distinct from other, independent, factors." 503 U.S. at 269. Here, the presence of such independent causal factors would require even more speculation than the Court declined to approve in *Holmes*: "EPA's CWA-mandated approval of the program has only an attenuated causal link to the reduction in Federal ESA conservation responsibilities." NAHB Pet. App. 117 (BiOp); *accord Anza*, 126 S. Ct. at 1998 (no proximate cause when a court would have to engage in a "speculative" inquiry); *Southern Pac. Co.*, 245 U.S. at 533 ("The general tendency of the law, in regard to damages at least, is not to go beyond the first step.").

Third, the State of Arizona is an intervening independent actor, displacing the EPA as the principal "authorizer" of any development. "[T]he common law is clear that certain intervening events – otherwise called 'superceding causes' – are sufficient to sever the causal nexus and cut off all liability." *Archer* v. *Warner*, 538 U.S. 314, 326 (2003); Restatement (Second) of Torts §452(2) ("Where ... the duty to prevent harm to another ... is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause."). One such "intervening event" is independent action by another entity. See, *e.g.*, *Siggers* v.

Barlow, 906 F.2d 241, 243-47 (6th Cir. 1990); *cf. Bennett* v. *Spear*, 520 U.S. at 167 (for there to be standing, the alleged injury "must be fairly traceable to the challenged action of the defendant, and not the result of some independent action of some third party not before the court"). Here, Arizona makes the ultimate decision whether to issue a particular permit, and thus is a superceding cause.

Fourth, *if* development is authorized by an Arizona water discharge permit, and *if* it does occur, the Ninth Circuit's hypothesized chain of causation further assumes that no other protections for species exist. This is simply wrong. Arizona's individual permitting decisions will be made in light of the numerous state and local laws that protect endangered and threatened species.[13] Indeed, it was due in part to the existence of such laws that the Biological Evaluation concluded "that any potential adverse effects to Federally-listed species or critical habitat would be insignificant and/or discountable." NAHB Pet. App. 615-16.

Moreover, numerous federal species-protective mechanisms make it speculative whether jeopardy to species will ultimately result. FWS took these protections into account. See NAHB Pet. App. 101-11 (BiOp). For instance, if the development requires a permit from some other federal agency – for example, a dredge-and-fill permit – ESA consultation still may be required. In addition, ESA § 9 imposes civil and criminal penalties for "tak[ing]" any listed species or destroying critical habitat." 16 U.S.C. § 1538; see NAHB

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[13] In Arizona, "a Sonoran Desert Multi-Species Conservation Plan is currently being drafted to protect the species of greatest concern including a cactus ferruginous pygmy-owl and Pima pineapple cactus." NAHB Pet App. 115 (BiOp). Arizona law prohibits the taking of native plants from any land within the State without following certain procedures. Ariz. Rev. Stat. § 3-904. In fact, the BiOp noted that Arizona's administration of the permitting program "[w]ould provide significant environmental benefits" because Arizona has substantially more staff than EPA in the relevant offices. NAHB Pet. App. 82-83.

Pet. App. 105-06, 112 (BiOp). The prospect that that provision will be violated is purely speculative, and such a violation would in any event break the chain of causation. See *Glass Packaging Inst.* v. *Regan*, 737 F.2d 1083, 1091 (D.C. Cir. 1984) (rejecting the argument that "consideration of environmental effects caused by reasonably foreseeable criminal acts of third parties" must be considered), *overruled in part on other grounds as explained in Hazardous Waste Treatment Council* v. *EPA*, 861 F.2d 277, 283 n.2 (D.C. Cir. 1988); *Loggerhead Turtle* v. *County Council*, 92 F. Supp. 2d 1296, 1307, 1308 (M.D. Fla. 2000); see also *Strahan* v. *Coxe*, 127 F.3d 155, 164 (1st Cir. 1997) (issuance of a license that can be used "in a manner consistent with both state and federal law" is not a "cause" of illegal conduct resulting from misuse of that license). ESA § 10 provides an additional mechanism to minimize jeopardy to protected species, in the form of "incidental take" permits – and as the BiOp recognized, the possibility that such permits would not be obtained is "speculative." NAHB Pet. App. 114-15.[14]

Furthermore, the ESA holds no monopoly over species protection. The CWA affords "substantive ... protections ... to Federally-listed species and critical habitat under the [EPA] permit program," and those protections "will continue under the [Arizona] permit program." *Id.* at 616 (Biological Evaluation). And the Biological Opinion enumerated a variety of ways in which EPA and FWS would superintend Arizona permitting decisions in order to protect species. *Id.* at 101-05.

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[14] The court below discounted §§ 9 and 10 on the theory that they are not perfect "substitutes for section 7 coverage." 420 F.2d at 975. Even if true, these provisions' protective effect attenuates the causation between a transfer of permitting authority and the possibility of jeopardy to species. Indeed, the court properly conceded that §§ 9 and 10 are "important provisions," and discounted them only by asserting that "there is no indication [in the record] that section 9 is or will be enforced meaningfully." *Id.* at 975. This is a federal statute backed by civil and criminal penalties, and so its deterrent effect should be plain.

Fifth, this remote and hypothetical causal chain is broken because the purview of the permitting program at issue here is water quality, and the species of concern in this case – the Pima pineapple cactus, as well as the now-delisted pygmy owl[15] – are not asserted to be affected by water quality. Rather, the species were thought to be potentially subject to "*non*-water quality related impacts." NAHB Pet. App. 562 (Elevation Document) (emphasis added).[16] This is not enough. See *Natural Res. Def. Council, Inc.* v. *EPA*, 822 F.2d 104, 128-31 (D.C. Cir. 1987) (EPA's CWA authority over discharge permits does not create jurisdiction over land-based construction). Put another way, even assuming that a transfer of permitting authority could be a cause of jeopardy to species, it would only be through water-quality-related impacts – and here, there would be no such impacts. Accordingly, transferring the wastewater discharge permitting proc-

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[15] Although the Arizona branch of the FWS initially identified two species as being affected by the permitting transfer program, NAHB Pet. App. 562, 563, one of those species – the pygmy owl – is no longer on the endangered or threatened species list. Final Rule to Remove the Arizona Distinct Population Segment of the Cactus Ferruginous Pygmy-owl From the Federal List of Endangered and Threatened Wildlife, 71 Fed. Reg. 19,452 (Apr. 14, 2006).

[16] The Pima pineapple cactus "grows in alluvial basins or on hillsides in semi-desert grassland and Sonoran desertscrub in southern Arizona and northern Mexico." *See* Arizona Ecological Servs. Field Office, FWS, *Pima Pineapple Cactus*, *at* http://www.fws.gov/southwest/es/arizona/Documents/Redbook/Pima%20Pineapple%20cactus%20RB.pdf (June 2000); *see also generally* http://www.fws.gov/southwest/es/arizona/pima.htm (last visited Feb. 19, 2007). The pygmy owl is also a desert upland species, "found primarily in Sonoran desert scrub vegetation with some locations in riparian drainages and semi-desert grassland vegetation communities." *See* Arizona Ecological Servs. Field Office, FWS, *Cactus Ferruginous Pygmy-Owl*, *at* http://www.fws.gov/southwest/es/arizona/Documents/Redbook/Cactus%20Ferruginous%20Pygmy%20owl.pdf (Jan. 2003); *see also generally* http://www.fws.gov/southwest/es/Arizona/Documents/PublicReview/CFPO/FINAL_REV_PROTOCOL.pdf (Jan. 2000).

ess from EPA to Arizona cannot be considered a "cause" of the harm contemplated by Respondents.

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Proximate causation is a fundamental principle throughout the law. This Court has recognized its role in § 9 of the ESA, and it likewise is the rule in § 7 of the statute. The Ninth Circuit's contrary conclusion was mistaken. And its finding of a causal relationship on a highly attenuated theory of but-for causation does not satisfy proximate cause, because the permitting decision is remote from any theoretical jeopardy to species, and because of the numerous intervening and superceding causes.

CONCLUSION

The decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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